Supreme Court, U.S.
FILED
96 819 NOV 25 1996
OFFICE OF THE CLERK

No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WAYNE SOIGNIER,

Petitioner,

vs.

THE AMERICAN BOARD OF PLASTIC SURGERY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chad Baruch
Abbott & Baruch
3301 Century Drive, Suite D
Rowlett, Texas 75088
Telephone: (972) 412-7192
Telecopier: (972) 412-4028

COUNSEL OF RECORD FOR PETITIONER

60 pp

QUESTIONS PRESENTED

1. Does the accrual rule set forth in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and its Title VII progeny govern accrual of a cause of action under the Americans with Disabilities Act?

2. May a court of appeals (consistently with the ADA, its implementing regulations, and its administrative scheme) conclude that an ADA claim can accrue before the interactive process of negotiations between the parties has concluded?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

1. Dr. Soignier's Complaint 6

2. The District Court's Decision 8

3. The Seventh Circuit's Opinion 9

REASONS FOR GRANTING THE WRIT 11

1. This Case Presents An Important Federal Statutory Issue That Was Resolved Incorrectly By The Court Of Appeals 11

2. The Seventh Circuit's Decision Causes ADA Plaintiffs To File Unnecessary And Premature Lawsuits, And Undermines The Intended Operation And Administration Of The ADA 20

3. Dr. Soignier Did Not "Discover" His ADA Claim Until May Of 1993; His Claim Is Not Untimely Under *Delaware State College v. Ricks* 23

CONCLUSION 24

APPENDIX A1

TABLE OF AUTHORITIES

Cases:

American Fed'n of Musicians v. Wittstein,
379 U.S. 171 (1964) 11

Beck v. Univ. of Wis. Bd. of Regents,
75 F.3d 1130 (7th Cir. 1996) 15, 20

Delaware State College v. Ricks,
449 U.S. 250 (1980) 23, 24

Grenier v. Cyanamid Plastics, Inc.
70 F.3d 667 (1st Cir. 1995) 15

Hinman v. Yakima School Dist. No. 7,
No. 12206-9-III, 3 A.D. Cases 1465
(Wash. Ct. App., Apr. 20, 1993) 18

Soignier v. Am. Bd. of Plastic Surgery,
92 F.3d 547 (7th Cir. 1996) 2

United States v. Ruzicka,
329 U.S. 287 (1946) 11

Constitutions, Statutes, and Rules:

28 U.S.C. § 1254 (1994) 2

28 U.S.C. § 1291 (1994) 9

28 U.S.C. § 1331 (1994) 8

28 U.S.C. § 1332 (1994) 8

29 U.S.C. § 621 (1994) 13

42 U.S.C. § 2000e (1994) 13

42 U.S.C. § 12181 (1994) 12

42 U.S.C. § 12189 (1994) 3, 12

42 U.S.C. § 12101 (1994) 4, 13

42 U.S.C. § 12212 (1994) 3, 22

28 C.F.R. § 36.309 (1996) 15

28 C.F.R. Pt. 36, App. B (1996) 15

29 C.F.R. § 1630.2 (1995) 14

29 C.F.R. Pt. 1630, App. (1995) 14-15

Other Authorities:

EQUAL EMPLOYMENT OPPORTUNITY COMM'N AND U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT HANDBOOK, October 1991 4

136 CONG. REC. 10,860 (May 17, 1990) 22

Robert A. Burgoyne, *ADA Update: Litigation and Enforcement Actions Involving Testing Accommodations, Fitness Inquiries, and Other Issues of Interest to Bar Examiners*, BAR EXAMINER, Nov. 1995 14

Mark Hansen, *The ADA's Wide Reach*, ABA J., Dec. 1993 4

Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457 (1994) 13, 22

Jeff Jacoby, *The ADA -- aka The Lawyers' Full Employment Act*, L.A. DAILY J., Apr. 4, 1995 5

Carol Krafka, *et al.*, *Stalking the Increase in the Rate of Federal Civil Appeals*, 18 JUST. SYS. J. 233 (1996) 5

Kim Mills, *50,000 Complaints Filed Under Americans with Disabilities Act*, CHI. DAILY L. BULL. Aug. 22, 1995 4-5

Rehnquist Warns of State of Court System, NAT'L L.J. Jan. 13, 1992 5

No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WAYNE SOIGNIER,

Petitioner,

vs.

THE AMERICAN BOARD OF PLASTIC SURGERY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Wayne Soignier petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Seventh Judicial Circuit entered in this case on August 12, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Appendix A) is reported as *Soignier v. American Board of Plastic Surgery*, 92 F.3d 547 (7th Cir. 1996). Its denial of rehearing (Appendix C) is reported at 1996 U.S. App. LEXIS 24757 (7th Cir. Sept. 19, 1996).

The judgment of the District Court for the Northern District of Illinois, Eastern Division (Appendix E) in this case is not reported. The District Court's opinion and order (Appendix D) are reported as *Soignier v. American Board of Plastic Surgery*, No. 95-C-2736, 1996 WL 6553 (N.D. Ill. 1996).

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was entered on August 12, 1996. The Seventh Circuit's order denying rehearing was entered on September 19, 1996. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

STATUTES INVOLVED

42 U.S.C. § 12189 (1994):

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12212 (1994):

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

STATEMENT OF THE CASE

This case arises under the Americans with Disabilities Act ("ADA"). The central issue presented by this appeal is when an ADA cause of action accrues. It is petitioner's central contention that the rule enunciated by the Seventh Circuit shall impede administration and operation of the ADA, and create an accrual rule that forces plaintiffs to file unnecessary federal lawsuits, potentially flooding the federal judiciary with disability claims.

President George Bush signed the ADA on July 26, 1990, and the law took effect on July 26, 1992. The ADA is the world's first comprehensive civil rights law for people with disabilities. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT HANDBOOK, October 1991, at 1 of Preamble. In passing the ADA, Congress expressly acknowledged the immense pool of potential disability litigants:

> The Congress finds that-
> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older . . . .

42 U.S.C. § 12101 (1994).

The ADA's potential to drive a litigation explosion soon became apparent. Within a year of the effective date, the Equal Employment Opportunity Commission had received more than 12,000 charges of disability discrimination. Mark Hansen, *The ADA's Wide Reach*, ABA J., Dec. 1993, at 14; *see also* Kim Mills, *50,000 Complaints Filed Under Americans with Disabilities Act*, CHI. DAILY L.

BULL., Aug. 22, 1995, at 1. Litigation under the ADA has been significant enough that one commentator has referred to it as the "Lawyers Full Employment Act." Jeff Jacoby, *The ADA -- aka The Lawyers' Full Employment Act*, L.A. DAILY J., Apr. 4, 1995, at 6.

Juxtaposed against this looming increase in disability litigation is a federal appellate system already overwhelmed by civil and criminal appeals. "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago." Carol Krafka, Joe S. Cecil, and Patricia Lombard, *Stalking the Increase in the Rate of Federal Civil Appeals*, 18 JUST. SYS. J. 233 (1996) (quoting Report of the Federal Courts Study Committee, 1990, at 109-110). "Unless checked, the result will be a degradation in the high quality of justice the nation has long expected on the federal courts . . . ." Chief Justice William Rehnquist, *quoted in Rehnquist Warns of State of Court System*, NAT'L L.J., Jan. 13, 1992, at 5.

1. *Dr. Soignier's Complaint*

Dr. Soignier is a plastic surgeon in Dallas, Texas. He has a learning disability related to auditory processing and is dyslexic.[1]

The American Board of Plastic Surgery, Inc. ("the Board") is involved in setting ethical standards for plastic surgeons, and is also the body that certifies plastic surgeons as "board certified." To that end, the Board administers a certifying examination to certain qualifying plastic surgeons. Part I of the examination is a written test. Part II of the examination is an oral test. According to the Board's rules, applicants for board certification may take the oral examination only five times. If not successful, they must complete an additional year of training in a plastic surgery residency before reapplying.

Board certification is a critical mark of professional competence. Besides the professional prestige and honor associated with board certification, many health maintenance

---

[1] The facts set forth in this petition are contained in the original complaint filed in the district court. Because this appeal arises from a motion to dismiss, the district and appellate court accepted these facts as true for purposes of determining the propriety of dismissal. Most of these facts are enumerated in the opinion rendered by the Court of Appeals.

and preferred provider organizations refuse to contract with non-board certified plastic surgeons. More than half of Dr. Soignier's potential patients are related to a preferred provider or health maintenance organization.

Dr. Soignier passed Part I of the certifying examination in 1983. Beginning in 1983, Dr. Soignier took Part II of the examination four times, each time failing at least one portion of the oral test. After his fourth failure, Dr. Soignier wrote to the Board and requested his disability be reasonably accommodated in the examination process. The Board agreed to retest Dr. Soignier with minor accommodations. In November of 1992, Dr. Soignier took Part II of the certifying examination for the fifth time. During that 1992 examination, the Board failed to provide all the accommodations previously agreed upon, and Dr. Soignier again failed the test. Following the test, Dr. Soignier again wrote the Board to ask that he be retested with the accommodations previously agreed upon, and certain additional accommodations. In May of 1993, the Board informed Dr. Soignier that it regarded the previous test as having been fair, that he would not be tested again, and that no further accommodations would be granted.

Dr. Soignier appealed both his failure of Part II and the denial of accommodations under the Board's internal appeals process. By letter dated November 30, 1994, the Board informed Dr. Soignier that his appeal had been denied and he would not be permitted to take the certifying examination again unless he completed an additional year of training in plastic surgery.

2. *The District Court's Decision*

On May 8, 1995, Dr. Soignier filed suit against the Board in the United States District Court for the Northern District of Illinois alleging violations of the Americans With Disabilities Act. The district court had federal question jurisdiction of the case pursuant to 28 U.S.C. § 1331 (1994) because a violation of federal statute was alleged, as well as diversity jurisdiction pursuant to 28 U.S.C. § 1332 (1994), because Dr. Soignier is a Texas citizen, the Board is a corporation incorporated in Illinois with its principal place of business in Pennsylvania, and the amount in controversy exceeds $50,000.00.

The Board immediately sought dismissal of Dr. Soignier's lawsuit on a variety of grounds. Among these arguments was the Board's contention that the action was

barred by the two-year statute of limitations under Illinois law for personal injury claims. The parties agreed that the two-year period applied to this case, but joined issue over when the cause of action accrued. The District Court held the cause of action accrued in November of 1992, when Dr. Soignier took the examination for the fifth time. It reasoned that the internal appeals process was used to remedy past wrongs and did not constitute a new wrong extending the accrual date. Because Dr. Soignier filed suit in May of 1995, the district court held his claims to be time-barred and dismissed them pursuant to Rule 12 of the Federal Rules of Civil Procedure.

3. *The Seventh Circuit's Opinion*

Dr. Soignier appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291 (1994). The Seventh Circuit reviewed the district court's decision *de novo* and affirmed it.

On appeal, Dr. Soignier argued that his claims did not accrue until negotiations between the parties collapsed in May of 1993, and his suit was therefore timely. Dr. Soignier also argued that limitations should have been tolled pending determination of his internal appeal. The Board again

contended that the claims accrued in November of 1992, at the time of Dr. Soignier's final testing.

The Seventh Circuit held Dr. Soignier's claims accrued in November of 1992, because each element of an ADA claim existed at that time. The Seventh Circuit applied traditional limitations doctrines from employment law cases, holding that Dr. Soignier knew in November of 1992 that he had been tested without some of the accommodations he sought, and his claim was therefore untimely pursuant to *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period for employment discrimination claim begins running at time discriminatory decision becomes known to plaintiff, not when effects become painful). The court rejected Dr. Soignier's arguments concerning the negotiations between the parties, characterizing them as "future confirmation" of the earlier decision, rendered in response to Dr. Soignier's attempts to undo a previous discriminatory decision (Appendix A at 11-12). The court also held that commencement and running of the limitations period were unaffected by the internal appeal (Appendix A at 14-16).

REASONS FOR GRANTING THE WRIT

1. *This Case Presents An Important Federal Statutory Issue That Was Resolved Incorrectly by the Court of Appeals*

The issue presented by this appeal is critically important to the operation of the ADA and to millions of potential ADA litigants. The ultimate resolution of the legal issues presented in this case shall in large measure determine the very manner in which the ADA operates and is administered. The importance of this federal statutory issue merits further review. *See, e.g., United States v. Ruzicka*, 329 U.S. 287 (1946). Moreover, this petition presents an important issue of first impression under the ADA. *See American Fed'n of Musicians v. Wittstein*, 379 U.S. 171 (1964). The Seventh Circuit is the first federal appeals court to address specifically the question of when an ADA public accommodations claim accrues.

Dr. Soignier's lawsuit against the Board arises under the "Public Accommodations and Services Operated By Private Entities" subchapter of the ADA. 42 U.S.C. §§

12181-12189 (1994). That subchapter provides, in relevant part, that:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C. § 12189 (1994). Because the Board offers examinations related to professional certification, it falls within the express terms of the ADA.

The ADA, like many federal civil rights statutes, does not contain a specific statute of limitations. Thus, the most appropriate state limitations period applies. The parties and both lower courts have agreed that Dr. Soignier's ADA claims are subject to the two-year limitations period for personal injury claims under Illinois law. The issue in this case when Dr. Soignier's cause of action accrued and that two-year period began to run.

Congress enacted the ADA in order "to provide a clear and comprehensive national mandate for the elimination

of discrimination against individuals with disabilities . . . ." 42 U.S.C. § 12101(b) (1994). In its sweeping mandate against discrimination, the ADA mirrors previous civil rights statutes addressing discrimination on the basis of race, religion, national origin, creed, age, and gender. *See, e.g.*, 29 U.S.C. § 621 (1994); 42 U.S.C. § 2000e (1994).

By contemplating an interactive process of negotiation between the parties, the ADA differs fundamentally from all other civil rights laws. By requiring "reasonable accommodation" and "accessibility" tailored to an individual's specific disability (which shall be unique to that individual, as various disabilities may manifest themselves to differing degrees in different individuals), the ADA contemplates an interactive process by which the parties to a disability dispute shall exchange information and negotiate accommodation. "Thus, while it may be clear that modifications have to be made, what is readily achievable is subject to interpretation in each individual case." Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457, 472 (1994). "[E]very request for an accommodation must be assessed on an

individual basis, in terms of both the existence of a covered disability and what accommodation(s) will be provided . . . ." Robert A. Burgoyne, *ADA Update: Litigation and Enforcement Actions Involving Testing Accommodations, Fitness Inquiries, and Other Issues of Interest to Bar Examiners*, BAR EXAMINER, Nov. 1995, at 6, 9.

The federal regulations implementing employment provisions of the ADA describe this interactive process:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3) (1995). The regulations envision an interactive process requiring participation by both parties:

> The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.

29 C.F.R. Pt. 1630, App. (1995).; *see also Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 677 (1st Cir. 1995); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) ("the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary").

The regulations specifically applicable to Dr. Soignier also require a case-by-case process of negotiation. The regulations governing "Examinations and Courses" describe a number of accommodations that may be appropriate to make examinations and courses accessible to the disabled, but leave the specific applicability of any certain accommodation to be determined on a case-by-case basis. *See* 28 C.F.R. § 36.309 (1996); 28 C.F.R. Pt. 36, App. B (1996).

This interactive process, rather obviously, renders the ADA different from any other type of civil rights claim. Nowhere is this difference any more important than in the context of limitations, and the question of when an ADA cause of action accrues.

The Seventh Circuit's opinion essentially adopts as a rule the notion that an ADA cause of action accrues whenever all elements of the claim are present which, in that court's

view, is whenever some accommodations are denied. According to the Seventh Circuit, Dr. Soignier had an actionable ADA claim in November of 1992, when the Board tested him without certain requested accommodations. This analysis simply ignores, and substantially undermines, the statutory scheme of private negotiation established in the ADA.

The interactive process envisioned by the ADA is unlikely in most cases to be a completely fluid process. Negotiation generally entails at least some level of disagreement, and under the ADA may well involve experimentation with various accommodations. It is, for example, easy to envision circumstances in which a disabled individual might request a host of accommodations, but a testing entity or employer might prefer at least initially to grant more limited accommodations in the hopes they would achieve the required access; this is, after all, the process of negotiation. In the event the accommodations prove to be insufficient, the parties might then agree to try additional accommodations. This process of negotiation, experimentation, and determination of reasonable accommodation may go on for some time. Eventually, one of

two things will happen: (1) both parties shall arrive at a set of accommodations on which they can agree; or (2) the disabled party shall demand accommodations the employer or testing entity simply will not agree to grant, at which point the interactive process breaks down.

This case is an excellent example of the ADA in action. Dr. Soignier negotiated certain accommodations with the Board prior to the 1992 test. When some of those accommodations were not granted and the accommodations granted proved to be insufficient, Dr. Soignier continued to correspond and negotiate with the Board after the test. After all, absent further communication, there was no way for him to know whether the accommodations were missing by design or mistake, or whether the Board would in light of his inability to pass the examination agree to additional accommodations. For example, the omissions might merely have been the result of miscommunication between the Board's Pennsylvania headquarters and testing staff at the Chicago test site. Alternatively, the Board might have determined, based upon the test results, that insufficient accommodations had been granted. The point is this: at least until the Board provided its initial indication in May of 1993

that no further accommodations or testing would be provided, the parties were engaged in the interactive process envisioned by the ADA and its implementing regulations.

Another example of this interactive process was presented in *Hinman v. Yakima School Dist. No. 7*, No. 12206-9-III, 3 A.D. Cases 1465 (Wash. Ct. App., Apr. 20, 1993). The plaintiff in that case, who suffered from asthma, began working as a high school guidance counselor in 1982. In 1983, the school's smoking lounge was moved into an area near plaintiff's office. Plaintiff informed the school that smoke from the lounge was affecting her asthma. During the next two years, a number of accommodations were provided by the school, to little effect. After taking a medical leave of absence, plaintiff returned to her job when the school promised to move the smoking lounge. In 1985, after plaintiff had returned to work, she was informed the lounge would not be moved. The school district argued that the subsequent lawsuit was untimely because the cause of action had accrued in 1983, when the lounge was moved to an area near plaintiff's office and not relocated after her complaints. The court disagreed, holding the school district had not officially and unequivocally refused to make reasonable

accommodation until 1985. This decision takes into account the interactive process of negotiation engendered by disability claims.

The appropriate test for accrual of an ADA claim should reflect this interactive process: such a claim should accrue at the precise point in time that a plaintiff knows or should have reason to know that this interactive process has collapsed. This approach is consistent with the language, history, and purpose of the ADA. Not insignificantly, it is also the only approach advanced by anyone involved in this case (including the district and appeals courts) that would result in consistent, fair, and equitable application of the law. This approach is consistent with the plain language of the ADA and its implementing regulations.

The Seventh Circuit's reliance upon Title VII employment cases was inappropriate. Title VII differs fundamentally from the ADA in that it does not contemplate or create an interactive process. This material difference affects accrual of the ADA cause of action. An ADA plaintiff might well be disabled, otherwise qualified, and without accommodation before the defendant is even aware of the disability. Such a plaintiff could not, however, maintain

an ADA claim in such a situation because the plaintiff has a burden to inform the defendant both of the disability and the necessary accommodations -- in other words, to participate in the interactive process. *See Beck*, 75 F.3d at 1137. Even if the basic elements of the claim are present, the action is not ripe and has not therefore accrued until the interactive process is ended.

Taking into account the intended operation of the ADA, the only appropriate point of accrual is the point at which the plaintiff knows or has reason to know the interactive process has collapsed.

2. *The Seventh Circuit's Decision Causes ADA Plaintiffs To File Unnecessary And Premature Lawsuits, And Undermines The Intended Operation And Administration Of The ADA*

The Seventh Circuit's decision, if permitted to stand, could have disastrous consequences for an already overcrowded federal judiciary. Under the rule enunciated by the Seventh Circuit, limitations on an ADA claim begins to run when any requested accommodations are denied. Because some accommodations may be denied very early in the interactive process, this rule could well (in fact, it almost

certainly will) force ADA plaintiffs to file prophylactic lawsuits while still engaged in good faith negotiations concerning accommodations. This will produce two undesirable effects. First, ADA plaintiffs will be forced to file federal lawsuits that may well be completely unnecessary. Second, the filing of the lawsuit almost certainly means the collapse of the interactive process -- a process that unhindered by a lawsuit might avoid the need for litigation.

To suggest, as the Seventh Circuit did, that the ADA claim could accrue before this negotiation collapses undermines the negotiation process. Before completion of the interactive process, the ADA plaintiff would have no idea whether litigation is necessary and, if it is, what denied accommodations should be the subject of such litigation.[2] Likewise, an ADA defendant would be sued before engaging

---

[2] Again, the facts of this case are compelling. Dr. Soignier negotiated with the Board prior to the 1992 test concerning what accommodations would be appropriate. Even before the 1992 test, the Board had refused to grant certain of the requested accommodations. Under the Seventh Circuit's analysis, all elements of an ADA claim would have existed when any accommodation was denied. In other words, this cause of action could have accrued, and the Board been subjected to suit, before Dr. Soignier even took the examination!

in the conduct giving rise to the lawsuit and would be denied any opportunity to avoid litigation.

Adoption of a limitations doctrine that so dramatically undermines settlement efforts is at odds with the ADA, which supports resolution through interactive negotiation. The ADA expressly states that "the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212 (1994). As the sponsor of this provision has pointed out in congressional discussion of the ADA, it was offered as a reminder that "[t]here are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation." 136 CONG. REC. 10,860 (May 17, 1990) (statement of Rep. Glickman).

Additionally, the federal agencies charged with enforcement and administration of the ADA are attempting to establish mediation programs to resolve disability disputes under the ADA. *See* Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ.

J. 457, 472-473 (1994). The Department of Justice is attempting to provide mediation services to resolve ADA complaints in several cities. To undermine these programs by forcing unnecessary lawsuits would impede the administration of the ADA.

3. *Dr. Soignier Did Not "Discover" His ADA Claim Until May Of 1993; His Claim Is Not Untimely Under Delaware State College v. Ricks*

In affirming dismissal of Dr. Soignier's claims, the Seventh Circuit relied heavily upon *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In *Ricks*, this Court held that an employee who had been informed of his impending termination could not delay accrual of his claims by pursuing an internal grievance. Rather, his claims accrued when the employer made and communicated its official decision to the employee.

The Seventh Circuit misanalyzed *Ricks*. According to the Seventh Circuit, *Ricks* barred Dr. Soignier's claim by holding that the refusal to undo a discriminatory decision is not a fresh act of discrimination (Appendix A at 12). But *Ricks* does not stand for the proposition that an ADA claim

accrues in the midst of negotiation. *Ricks* is a Title VII case that does not govern this action. After all, there was no interactive process at issue in *Ricks* prior to communication of the employment decision of which plaintiff complained; there was only a subsequent appeal. In this case, there was an interactive process prior to and contemporaneous with communication of the decision. *Ricks* does not govern this case.

Of course, the Board did not officially notify Dr. Soignier of its refusal to provide retesting with additional accommodations until May of 1993. Even if *Ricks* governed this ADA issue, it would not render Dr. Soignier's claims time-barred.

CONCLUSION

The opinion of the Court of Appeals represents a decided setback to efficient and economical administration and civil enforcement of the ADA. The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Charles Baruch

Charles E. "Chad" Baruch
Abbott & Baruch
3301 Century Drive, Suite D
Rowlett, Texas 75088
Telephone: (972) 412-7192
Telecopier: (972) 412-4028

Counsel for Petitioner

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 96-1255

WAYNE SOIGNIER,

Plaintiff-Appellant,

v.

AMERICAN BOARD OF PLASTIC SURGERY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 2736 - Charles R. Norgle, Sr., *Judge*

ARGUED JUNE 5, 1996 - DECIDED AUGUST 12, 1996

Before COFFEY, MANION, and KANNE, *Circuit Judges*.

MANION, *Circuit Judge*. A plastic surgeon claims certain disabilities prevented him from passing the oral examination portion of a board certification examination. On his fifth attempt the American Board of Plastic Surgery gave him extra time to complete the test and allowed him to use

demonstrative aids. He still did not pass. The surgeon pursued an internal appeal of this failure and the denial of some of his requested accommodations, which the Board denied. He then sued the Board alleging the accommodations offered him failed to satisfy Title III of the Americans with Disabilities Act, 42 U.S.C. §§ c12181-12189 ("ADA"). Because his cause of action accrued when he took the test without the accommodations he requested, and because his internal appeal did not stay the statute of limitations, the district court properly dismissed his case as barred under the applicable limitations period.

I.

Board certification is a critical mark of professional medical competence. Dr. Wayne Soignier, a plastic surgeon from Dallas, Texas, passed the written portion of his board certification exam in 1983, but did not pass the oral portion after four attempts. According to the American Board of Plastic Surgery's rules, applicants for board certification may take the oral exam only five times. If not successful they must complete an additional year of training in a plastic surgery residency before reapplying. Soignier's diligence in

seeking certification is understandable: besides the professional prestige associated with board certification, many health maintenance and preferred provider organizations refuse to contract with non-board certified plastic surgeons. Over half of Soignier's potential patients are related either to an HMO or a PPO.

The next oral exam scheduled for November 1992 would be his last chance (unless he completed additional training). For that exam Soignier asked the Board to accommodate his disabilities, which he says include an attention deficit disorder, difficulty processing and expressing information due to an "auditory processing disability" and dyslexia. Soignier requested more time to take the test, use of models and paper drawings during the test, and different examiners than those who had administered his past tests. The Board did not accede to all of his requests, but did give him extra time to complete each session and allowed him to explain his answers using demonstrative aids. Even with these accommodations, he did not pass the orals on this fifth try.

Soignier then pursued a voluntary internal appeal before the Board. He also sought another oral exam with additional

accommodations. On May 13, 1993, the Board alerted him that "the circumstances of this examination were as accommodating as could be structured" and that he would not be given another chance to take the orals. In November 1994 the Board denied his internal appeal. It upheld the test result and found that the November 1992 examination had been conducted fairly.

On May 9, 1995, Soignier sued the Board alleging that the accommodations offered him did not satisfy 42 U.S.C. § 12189 of the ADA, which mandates that professional certification examinations be offered in a place and manner acceptable to the disabled. His complaint alleged that his failure to pass the oral exam "is not surprising, in that it is presented in a format particularly inappropriate for a physician with a learning disability." He asserted the Board's modifications at the November 1992 test "were largely illusory" and "woefully insufficient."[1]

---

[1] The district court had federal question jurisidction because the surgeon alleged a violation of 42 U.S.C. § 12189, as well as diversity jurisdiction because the surgeon is a Texas citizen, the Board is a corporation incorporated in the state of Illinois with its principal place of business in Pennsylvania, and the amount in controversy exceeds $50,000. This court properly has jurisdiction pursuant to 28 U.S.C. § 1291 because the district court's January 5, 1996 dismissal order is a final order and the surgeon timely filed his notice of appeal on January 31, 1996.

The Board moved to dismiss Soignier's complaint as time-barred. The parties agreed that Illinois' two-year statute of limitations period for personal injury actions applied.[2] Ill. Stat. ch. 735, ¶ 5/13-202 (1993). The district court found that Soignier discovered his claimed injury in November 1992, as evidenced by the allegations in his complaint. It reasoned that the internal appeals process was used to remedy past wrongs and to review his request for a retest, and therefore did not constitute a new wrong extending the accrual date. Because Soignier's claim accrued in November 1992, but he did not file his complaint in federal court until May 1995, the district court dismissed this suit as time-barred pursuant to Fed. R. Civ. P. 12.

We review *de novo* the district court's dismissal order. *Jones v. General Elec. Co.*, 87 F.3d 209, 211 (7th Cir. 1996); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995). We must accept all allegations properly pleaded in the complaint and make reasonable inferences in the doctor's

---

[2] Soignier's claims arose "substantially within" the Northern District of Illinois, and thus satisfy the venue requirement of 28 U.S.C. § 1391, as the Board is an Illinois corporation and heard Soignier's internal appeal in Chicago.

favor. *Jones, id.*; *see Graehling v. Village of Lombard, Illinois*, 58 F.3d 295, 297 (7th Cir. 1995).

II.

Soignier argues that the district court erred when it dismissed his suit as untimely because the Board engaged in a continuous course of conduct which extended the accrual date of his claim and because the limitations period should have been tolled during the internal appeal. As backup, the surgeon contends that the statute of limitations should be equitably tolled, and that the Board is equitably estopped to assert the limitations period as an affirmative defense.

A. Choice of Statute of Limitations

The ADA, like many federal civil rights statutes, does not contain a specific statute of limitations. Thus, the most appropriate state limitations period applies. 42 U.S.C. § 1988(a); *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). *Wilson* dictates a three-step borrowing analysis: if no federal law provides a limitations period (step 1), the common law as modified by state statute is to be applied (step 2), but only if it is not inconsistent with the Constitution and laws of the United States (step 3). Under step 2, courts are to select the

statute of limitations of the state cause of action "most appropriate" or "most analogous" to the plaintiff's claim. *See, e.g., Owens v. Okure*, 488 U.S. 235, 239 (1989); *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984).

The statute Soignier invokes in Title III of the ADA prohibits discrimination by a private entity offering a professional certification examination. We agree with the parties that this claim is best characterized as one for personal injury. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (action for discrimination is one for "fundamental injury to the individual rights of a person"); *Wilson*, 471 U.S. at 280 (claims which allege discrimination are best characterized as personal injury actions). The district court thus correctly applied Illinois' two-year statute of limitations for personal injuries as the most analogous limitations period for Soignier's ADA claim.[3]

---

[3] Dr. Soignier claims violation of a statute enacted as part of Title III of the ADA. The cases in which district courts in this circuit considered this question both involved claims under Title II of the ADA. *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1112 & n.1 (C.D.Ill. 1995) (applying Illinois' two-year statute of limitations to ADA claim); *Doe v. County of Milwaukee*, 871 F. Supp. 1072, 1077-78 (E.D.Wis. 1995) (applying Wisconsin's six-year limitations period for "injury to character or other rights" to ADA claim). Other district courts, correctly, have not distinguished between Titles II and III in borrowing state limitations periods. *See, e.g., Asselin v. Shawnee Mission Medical Center, Inc.*, 903

B. Application of Statute of Limitations

Although the parties agree which limitations period applies, they dispute when it began to run. The district court concluded that an ADA claim such as Soignier's under 42 U.S.C. § 12189 accrues when a covered entity refuses to offer an examination in a manner accessible to an otherwise qualified disabled American. In his complaint Soignier alleges that in November 1992 he was disabled but that the Board refused him sufficient test-taking accommodations for his disabilities. [Dist. Ct. Opinion pp. 3-5] Because the elements of an ADA claim were present when Soignier took his orals for the fifth time in November 1992, the district court reasoned that the two-year limitations period began to run then. The court concluded therefore that the complaint filed in May 1995 was untimely.

F. Supp. 1454, 1456 (D.Kan. 1995) (applying Kansas' two-year statute of limitations for personal injuries to Title III ADA claim) and *Doukas v. Metropolitan Life Ins. Co.*, 882 F. Supp. 1197, 1199-1200 (D.N.H. 1995) (applying New Hampshire's three-year general personal injury statute of limitations to Title III ADA claim). Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, prohibits discrimination by public accommodations on the basis of disability, and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with accessibility standards. As would be expected when two statutes share the same purpose, the three-step borrowing analysis under § 1988(a) has the same result: the choice of a state personal injury statute of limitations.

On appeal, Soignier argues that the Board engaged in a "continuous course of conduct" against him. To Soignier, the Board's unlawful conduct under the ADA only began with the fifth oral exam in November 1992, continued with the Board's refusal to retest him in May 1993, and did not end until its denial of his internal appeal and refusal to provide testing with the accommodations he requested in November 1994. He asserts that the earliest his claim could have accrued was May 13, 1993, when the Board refused to retest him, and more probably the period did not begin to run until that continuous course of conduct ended in November 1994. The dismissal order is incorrect, Soignier submits, because he filed suit within two years of either of these dates.

The law and reason support the district court's decision. *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and its progeny in this circuit dictate that discovery of the original act of discrimination, *not* future confirmation of the injury or determination that the injury is unlawful, is when the statute of limitations begins to run. *Id.* at 258. *See, e.g., Kennedy v. Chemical Waste Mgmt., Inc.*, 79 F.3d 49, 50 (7th Cir. 1996) (deprivation of employee benefit was injury that set statute

of limitations running in ADA action, even though injury was contingent); *Thelen*, 64 F.3d at 267 (injury discovered when controller informed employee he would be terminated; statute of limitations begins to run on that date); *Graehling*, 58 F.3d at 297 (7th Cir. 1995) (separation at a time established by an earlier decision not a fresh act of discrimination; only original decision to let employee go subject to ADA); *Palmer v. Bd. of Educ.*, 46 F.3d 682, 685-86 (7th Cir. 1995) ("Like punching someone in the nose, this act may lead to injury in the future, but when there is only one wrongful act the claim accrues with the first injury.") Put another way, "[t]ime starts to run with the "*discriminatory act*, not the point at which the *consequences* of the act become painful.'" *Lever v. Northwestern Univ.*, 979 F.2d 552, 553 (7th Cir. 1992) (emphasis in original, quoting *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981), *cert. denied*, 508 U.S. 951 (1993)); *see also Connor v. Reckitt & Coleman, Inc.*, 84 F.3d 1100, 1102 (8th Cir. 1996) (statute of limitations for ADA claim begins to run at time of discriminatory act, not when act's consequences become most painful); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 449-50 (7th Cir. 1990) (statute of limitations in age

discrimination in employment case began to run when plaintiff discovered injury, not date on which "full consequences of action" became clear), *cert. denied*, 501 U.S. 1261 (1991).

Under this law, the district court correctly ruled that the two-year statute of limitations began to run in November 1992 when the Board administered the oral exam for the fifth and final time. The complaint alleges that when Soignier completed the orals in November 1992, he was aware that the Board had conducted the test without the accommodations he allegedly deserved. Soignier claims that at that time, he was disabled and otherwise eligible to take the orals, but that the Board refused him reasonable accommodations for his disability. These are each of the elements of an ADA claim. *See, e.g., D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) (listing elements of ADA claim for suit by visually disabled state bar applicant).

In May 1993, the Board refused to grant Soignier an extra attempt to pass the orals. In November 1994, the Board affirmed its November 1992 test-taking procedures and refused to void the 1992 results. "An employer's refusal to

undo a discriminatory decision is not a fresh act of discrimination." *Lever*, 979 F.2d at 556. *Ricks* and the cases delineated above so hold. The events of May 1993 and November 1994 are "future confirmation" or "consequential" of the surgeon's alleged injury. These actions do not constitute new, separate discriminatory acts actionable under the ADA. Rather, they are part of the harm that continued to flow to the surgeon as a result of the Board's administration of the November 1992 test. Accordingly, the district court properly concluded that the Board's actions after November 1992 did not constitute new acts of discrimination, and thus that the limitations period expired in November 1994, roughly six months before Soignier filed suit.

In support of his "continuing violation" theory, Soignier relies heavily on *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996), in which this court ruled that the responsibility for requesting an accommodation rests with an ADA plaintiff, but that an "interactive process" is necessary to determine what if any accommodations are reasonable and will be provided. *Id.* at 1135-37. He argues that the point for accrual should be when this interactive process between the

parties breaks down, which according to him was at the earliest May 13, 1993, when the Board refused to grant him a sixth attempt at passing the oral examination. Soignier maintains this is the only approach consistent with the ADA and this court's decision in *Beck*. He submits that an accrual date before May 1993 would require ADA plaintiffs to file prophylactic suits.

The law and the facts do not support this argument. In *Beck*, this court recognized that the party responsible for the breakdown in the "interactive process" in determining the reasonableness of a disability accommodation would be liable under the ADA. 75 F.3d at 1136-37. *Beck* does not stand for the proposition that the limitations period begins to run at the date of such a breakdown. Rather, the facts of this case under the controlling law allow for only one "discovery" date for the statute of limitations: November 1992. All parties understood then that Soignier was disabled. The absence and reasonableness of certain requested accommodations at the November 1992 test would be at issue if this case went to trial. Moreover, discovery in November 1992 would not require a prophylactic suit. It is undisputed that the doctor

knew at the last oral exam that he had not received all of the accommodations he requested. This failure is the allegedly discriminatory act which allowed Soignier to go on the offensive and file his complaint.

Soignier also asserts the limitations period should have been tolled during his internal appeal. This contention is contrary to *Ricks* and the law cited above. Rather than an independent wrong, the denial of the surgeon's appeal merely confirmed the Board's earlier decisions that sufficient accommodations had already been made for his disabilities and that he would not be retested. Soignier engaged the Board's internal appeals process in an attempt to reverse the Board's decisions to offer limited accommodations at the November 1992 test and not to offer a sixth test. But "an employer's refusal to undo a discriminatory decision is not a fresh act of discrimination." *Graehling*, 58 F.3d at 297. An employee's pursuit of an internal grievance procedure does not affect the date on which his claim accrued. Unlike an EEOC investigation (ending with a right to sue letter), internal appeals are not part of the ADA statutory procedure and do not toll the time for filing suit. *See Lever*, 979 F.2d at 556 (citing *Ricks* and *Chardon*).

Because there is no first obligation to pursue administrative remedies, Soignier had to file within two years of the accrual date even if he had not exhausted all possible internal remedies. His internal appeal was only an added forum - an opportunity to get two bites at the apple.

Soignier's argument could possibly have been strengthened had he framed it as one of pure ripeness: he knew in November 1992 that his rights had been abridged, but with the internal appeal pending he had yet to find out whether that was the Board's approach or just a mistake. Why should he be prematurely forced into litigation with professional organizations which already have adjudicatory mechanisms to handle such disputes internally? Soignier could have stressed the importance of institutions working things out internally if they can, free from undue litigation pressures.

Even if he had made these assertions, there are strong countervailing concerns. Important policies underlie statutes of limitations: rapid resolution of disputes; repose for those against whom a claim could be brought; avoidance of litigation involving lost evidence or distorted testimony of witnesses. *See Wilson*, 471 U.S. at 271. Sensitive to these policies,

Ricks and its progeny dictate that the cause of action accrues at the time of the initial injury. Here, because each of the elements of an ADA claim were present when Soignier took his orals for the fifth time in November 1992, the two-year statute of limitations period began to run then. To avoid premature litigation, the Board could have agreed to waive or toll the statute of limitations. Likewise, Soignier could have timely filed his suit and requested a stay pending the outcome of the internal appeal. The parties employed neither tactic, allowing the two-year period to expire.

C. Equitable Tolling/Equitable Estoppel

Soignier also claims that the statute of limitations should be equitably tolled and that the Board is equitably estopped to assert a limitations defense. Neither argument is persuasive.

Equitable tolling applies when a plaintiff, despite the exercise of due diligence and through no fault of his own, cannot determine information essential to bringing a complaint. *Thelen*, 64 F.3d at 268 (citing *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994); *Cada*, 920 F.2d at 451). In November 1992, Soignier was aware of each of the elements of his ADA claim: (a) he was a qualified person

with a disability; (b) the law required the Board to provide him with reasonable accommodations during the test; and (c) the Board allegedly failed to provide those accommodations. *See D'Amico*, 813 F. Supp. at 221. "[T]he limitations period begins to run when a reasonable person would believe he may have a cause of action . . . ." *Thelen*, 64 F.3d at 268 (quoting *Cada*, 920 F.2d at 451). Because the allegations in his own complaint demonstrate he knew each of these elements at the fifth try at the orals, equitable tolling does not extend the limitations period on his claim.

Equitable estoppel requires that "the defendant takes active steps to prevent the plaintiff from suing in time, . . . such as by hiding evidence or promising not to plead the statute of limitations." *Thelen*, 64 F.3d at 267 (citing *Cada*, 920 F.2d at 450-51). Soignier asserts that the Board delayed hearing his internal appeal until November 1994, the last day of the month in which the statute of limitations ran, and explained his internal appeal option without also telling him he had the option to file a lawsuit. These actions do not amount to the misleading promises not to plead the statute of limitations or destruction of documents which constitute equitable tolling.

Thelen, 64 F.3d at 267. Dr. Soignier points to no other facts which would qualify under this standard.

III.

Because the elements of an ADA claim were present when Soignier took his orals for the fifth time in November 1992, the applicable Illinois two-year personal injury limitations period began to run then. Neither Soignier's internal appeal nor the legal doctrines of equitable tolling or equitable estoppel stay that limitations period. The May 1995 filing of this suit is thus too late. Accordingly, the district court's dismissal of Soignier's complaint as time-barred is

AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
September 19, 1996

Before
Hon. John L. Coffey, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

Wayne Soignier,
Plaintiff-Appellant,

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division

v.

No. 95 C 2736

No. 96-1255

Charles R. Norgle Sr., Judge

American Board of Plastic Surgery,
Defendant-Appellee.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 12, 1996
Before:

Hon. John L. Coffey, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

No. 96-1255

WAYNE SOIGNIER,

Plaintiff-Appellant

v.

AMERICAN BOARD OF PLASTIC SURGERY,

Defendant-Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 95 C 2736, Charles R. Norgle, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of the court entered on this date.

(1061-110393)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WAYNE SOIGNIER,	)	
	)	
Plaintiff,	)	
	)	No. 95 C 2736
v.	)	
	)	
THE AMERICAN BOARD OF PLASTIC SURGERY,	)	
	)	
	)	
Defendant.	)	

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is the Motion to Dismiss of Defendant American Board of Plastic Surgery ("Board"). The Board raises two principal arguments to support its position. For the reasons that follow, the motion is granted.

I.

Plaintiff is a plastic surgeon who maintains a private practice in Dallas, Texas. The Complaint avers that he has "a

learning disability related to auditory processing," and that he is dyslexic. The Board sets ethical standards in the profession and provides continuing legal education as well as certification for plastic surgeons. The certification requires applicants to pass a Board-administered examination. The exam consists of two parts -- Part I is a written test, Part II is an oral test. Despite his dyslexia, Plaintiff passed Part I in 1983 on the first try. However, Plaintiff has failed Part II each of the five times he took it since 1983. After his fourth attempt and failure, Plaintiff requested that he be accommodated for the next examination. He was accommodated: the Board agreed in 1991 to some of Plaintiff's requests for the fifth test, which he took in November 1992. The Complaint pleads that Plaintiff failed the fifth test in November 1992 due to insufficient accommodations, and that Plaintiff appealed the matter through the Board's internal appeals process. On November 9, 1994, the Complaint alleges, the Board refused to accommodate Plaintiff further for his disabilities. Plaintiff now sues under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12189.

II.

At issue is not whether Plaintiff's disabilities warrant accommodations, nor is it whether the accommodations which the Board offered were sufficient under the statute. The issue before the court is whether Plaintiff stated a claim for relief. The Board's first argument is that Plaintiff should have filed a grievance with the Illinois Human Rights Commission within 180 days of the discrimination. Both parties acknowledge that 42 U.S.C. § 12188 is the enforcement provision that controls subchapter III (the subchapter at issue) and that the section refers to another section of title 42. However, both seem to agree that 42 U.S.C. § 2000a-3(c) applies, but dispute its applicability under these facts. By the express terms of § 12188, the only provision adopted for subchapter III of the ADA is § 2000a-3(a). Although subsection (c) limits when subsection (a) may be invoked, Congress only cited the latter. Therefore, there is no requirement that parties provide notice to a state or local authority.[4]

---

[4] Even is subsection (c) were applicable, the court would not be persuaded that such a notice requirement exists for the reasons stated in Plaintiff's responses.

The Board's second argument is that Plaintiff violated Illinois' two-year statute of limitations. As a procedural matter, the court finds that the limitations issue, an affirmative defense, is ripe for a motion to dismiss because a violation appears on the face of the Complaint. EEOC v. Park Ridge, 856 F. Supp. 477, 480 (N.D. Ill. 1994). Both parties agree that two years is the appropriate limitations period. The parties disagree about when the claim accrued. The Board argues that the claim accrued when Plaintiff failed the fifth test in November 1992, and was denied any additional accommodations to take a sixth test. Furthermore, they argue, the subsequent optional internal appeals process did not delay the date of accrual. Plaintiff argues that the lawsuit does not arise from the disability discrimination arising out if the 1992 examination; rather it arises from the Board's denial of his appeal, on November 9, 1994, and refusal to provide a test pursuant to the statutorily mandated conditions.

"A plaintiff's action accrued when he discovers that he has been injured, not when he determines that the injury was unlawful." Thelen v. Marc's Big Boy Corp., 64 F.3d 264,

267 (7th Cir. 1995). Thus, for purposes of this motion to dismiss, the court must determine the date the claimed injury was discovered. The "Examinations and courses" section of the ADA, 42 U.S.C. § 12189, requires that persons who offer examinations related to certification for professional purposes shall offer them in a place and manner accessible to those with disabilities. Id. The section assumes, see 42 U.S.C. §§ 12131(2), 12182, that the disabled individual is otherwise qualified to take the exam. For instance, the statute would not require that a blind student be afforded accommodations for taking Illinois' Bar Examination if the student had not graduated from law school. An injury or violation, therefore, would occur where a covered entity refuses or fails to offer an examination in a manner accessible to an otherwise qualified disabled American. Pazer v. New York State Bd. of Law Examiners, 849 F. Supp. 284, 286 (S.D.N.Y. 1994). As long as a disabled individual is otherwise qualified, a cause of action arises from the mere denial of a request.

Here, drawing all reasonable inferences in Plaintiff's favor as must be done, Stephenson v. Stone, 21 F.3d 159, 161 (7th Cir. 1994), a claim for relief is not pleaded. The

Complaint pleads that Plaintiff was disabled and that he was otherwise eligible to take Part II of the exam. However, the Complaint pleads that the Board refused Plaintiff sufficient accommodations in November 1992. Plaintiff sought the appeal process to reverse two decisions that the Board made in November 1992: the decision to offer limited accommodations at the fifth test, and the decision not to offer a sixth test. The November 9, 1994 date, relates to the appeal process only. Plaintiff chose to employ the internal appeal process to challenge past discrimination of which he was aware. See Graehling. Village of Lombard, 58 F.3d 295, 297 (7th Cir. 1995) ("'An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination.'") (quoting Lever v. Northwestern Univ., 979 F.2d 552, 556 (7th Cir. 1992), aff'd, 19 F.3d 21 (7th Cir. 1994); but see Stevens v. Northwest Ind. Dist. Council, 20 F.3d 720, 730 n. 25 (7th Cir. 1994) (holding that an intra-union appellate process properly pursued, should not be used against a plaintiff). Plaintiff sought the appellate panel to undue past wrongs and also to review his request for a retest with improved accommodations. The allegations in the complaint

dealing with testing and accommodation during the 1983 to November 1992 period are time barred. When the Board denied the appeal no new wrong occurred. Accordingly, the claim is barred by the statute of limitations.

In sum, the court finds that the agreed upon two year statute of limitations bars Plaintiff's claim which accrued in November 1992. For the forgoing reasons, the Board's Motion to Dismiss is granted.

IT IS SO ORDERED.

ENTER:

/s/

CHARLES RONALD NORGLE, SR.,
Judge United States District Court

DATED: 1/5/96

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

WAYNE SOIGNIER

JUDGMENT IN A CIVIL CASE

vs.

CASE NUMBER: 95 C 2736

THE AMERICAN BOARD OF
PLASTIC SURGERY

___Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's claim is barred by the statute of limitations and his complaint is dismissed.

January 5, 1996
Date

H. Stuart Cunningham
Clerk

/s/

(By) Deputy Clerk

Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

No. 96-819

In The

Supreme Court of the United States

October Term, 1996

WAYNE SOIGNIER,

Petitioner,

vs.

THE AMERICAN BOARD OF PLASTIC SURGERY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DOUGLAS R. CARLSON
Counsel of Record
FREDERICK L. SCHWARTZ
RICHARD L. CREECH
WILDMAN, HARROLD, ALLEN & DIXON
Attorneys for Respondent
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

70188 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

4 pp

Respondent, the American Board of Plastic Surgery, Inc.,[1] respectfully suggests that this Court deny the Petition for a Writ of Certiorari filed by Petitioner Wayne Soignier.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons."[2] Petitioner's petition fails to present a compelling reason for this Court to review this action, and should accordingly be denied.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S OPINION IS NOT INCONSISTENT WITH AN OPINION OF ANOTHER FEDERAL APPELLATE COURT OR WITH A STATE COURT OF LAST RESORT.

This Court has stated that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The Seventh Circuit's disposition of this action created no disagreement among the United States courts of appeal. As Petitioner's petition concedes, "[t]he Seventh Circuit is the first federal appeals court to address specifically the question of when an ADA public accommodation claim accrues." (Pet. For a Writ of Cert. at 11.)

---

1. Pursuant to Supreme Court Rule 29.6, Respondent states that it does not have a parent company or any nonwholly owned subsidiaries.

2. Rule 10 identifies three types of cases which are prime candidates for this Court's discretionary review. This action fits into none of these three enumerated categories.

There is likewise no inconsistency between the Seventh Circuit's opinion and an opinion of a state court of last resort. A state case upon which Petitioner's petition heavily relies, *Hinman v. Yakima Sch. Dist.*, 850 P.2d 536 (Wash. Ct. App. 1993), *review denied*, 889 P.2d 498 (Wash. 1994), is not from the highest court of that state, but is rather from an intermediate-level appellate court. Moreover, *Hinman* did not involve an issue of federal law. Instead, it was concerned with the accrual of the statute of limitation under Washington law. As a result, the existence of *Hinman* fails to present a compelling reason for this Court to grant review of this action.

II.

THE SEVENTH CIRCUIT'S OPINION IS IN HARMONY WITH CONTEMPORARY CIVIL RIGHTS LAW.

The Seventh Circuit's opinion below was a logical and appropriate application of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which this Court held that a plaintiff's use of an internal grievance procedure did not extend the time period during which the plaintiff must file a race discrimination charge under Title VII of the Civil Rights Act of 1964. By making the standard for accrual of a cause of action in the current action under the ADA the same as that under Title VII, the Seventh Circuit has promoted uniformity in the application of the federal anti-discrimination laws.

Analogizing the ADA to Title VII is also consistent with congressional intent, *see, e.g.*, 42 U.S.C. § 12188 (provision of ADA incorporating remedies and procedures of Title VII) and certainly does not mark an unwarranted departure from the development of civil rights jurisprudence. *See, e.g., McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996)

(noting that the language regarding liability under the ADA is "substantially identical" to the language contained in Title VII); *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994) (concluding that the definition of the term "employer" is not significantly different under the ADA than it is under Title VII); *Stephens v. Kay Management Co.*, 907 F. Supp. 169, 171 (E.D. Va. 1995) (stating that decisions interpreting Title VII "provide useful assistance in interpreting similar provisions of the ADA respecting the extent to which a supervisor may be held personally liable for employment decisions"); *West v. Russell Corp.*, 868 F. Supp. 313 (M.D. Ala. 1994) (applying the indirect evidence burden-shifting methodology used under Title VII in ADA action). There is therefore no compelling reason for this Court to grant certiorari in this action.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DOUGLAS R. CARLSON
Counsel of Record
FREDERICK L. SCHWARTZ
RICHARD L. CREECH
WILDMAN, HARROLD, ALLEN & DIXON
Attorneys for Respondent
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000